United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

Original

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In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7358

B

P/S

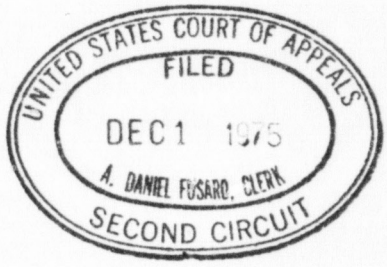
FRANKLIN H. LITTELL

Appellant

v.

WILLIAM F. BUCKLEY, JR.

Appellee



On Appeal From the
United States District Court
for the
Southern District of New York

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

The decision appealed from was rendered by the Hon. Thomas P. Griesa, U.S.D.J. His opinion is reported at 394 F. Supp. 536.

ISSUES PRESENTED FOR REVIEW

1. Whether appellee is libel-proof

2. Whether appellant's statements must be regarded as protected opinion, epithet and rhetoric

3. Whether appellant in fact made the statements attributed to him by the court below

4. Whether the statements made by appelant are true

5. Whether the statements made by appellant, if false, were made with malice

6. Whether the punitive damages awarded to Buckley are excessive

STATEMENT OF THE CASE

This is an appeal in a defamation action from a judgment of $1.00 compensatory and $7,500 punitive damages, entered after a non-jury trial before Judge Thomas P. Griesa in the United States District Court for the Southern District of New York. The opinion below is reported at 394 F. Supp 918 (1975) and is reproduced in the Appendix at AII 536-561. 1/

William F. Buckley, Jr., the nationally-known political commentator, sued Franklin H. Littell, author of the allegedly libelous book, Wild Tongues, and its publisher, The Macmillan Company. Jurisdiction was based on diversity of citizenship. Buckley and Macmillan reached a settlement during the trial (on terms unknown to appellant) and the action against Macmillan was discontinued (AII 374-75; 427-30).

Littell defended himself pro se at the trial, generally relying on Macmillan to make the defense case. After Macmillan settled, its attorney remained present and assisted Littell in an amicus curiae capacity by examining Littell as a witness and by briefing and arguing Littell's position.

After receiving evidence, including many documents, on ten trial days in April, May and June 1974, Judge Griesa awarded Buckley $1.00 in general compensatory damages and $7,500 in punitive damages.

1/ The Appendix is in two volumes. References to each are made by the symbols AI and AII respectively.

STATEMENT OF THE FACTS

The Alleged Libel

Wild Tongues was published by Macmillan in October 1969. It was voluntarily withdrawn from distribution in July 1970, when this action was begun. The book sold 941 hardcover and 8,226 soft cover copies. Littell received no royalties beyond a $500 advance. Macmillan's total revenues from sales of the book were $9,699 (AII 431-34).

The complaint alleged only that five paragraphs on pages 50 and 51 of Wild Tongues defamed Buckley:

> The Fellow Traveler
>
> Whisking about the edges of any totalitarian movement is the "fellow traveler," pirouetting into the whirlpool and out again as the vortex draws more powerfully and then recedes. His role is as dangerous to social health and as important to building up totalitarian parties as the equally ambigous figure of the pseudo-conservative. The fellow traveler to the Communists or fascists is a fascinating psychological study: fascination with brute force and its misuse plays an important role. Students of communism have commented at length upon the party member's "psychology of the pawn"--his need to be misused and abused, to the destruction of his own personhood. The fellow traveler's responses are essentially feminine, registering the ambivalence of love and hate toward the master and mover.
>
> The fellow traveler refuses to accept discipline and is therefore both used and despised by the party leaders. At the same time, he is dangerous to political movements and republican institutions of integrity, because he functions as a deceiver. He appears at times to be independent, but, when a major issue is at stake, he follows the party line.

Perhaps the most famous type in recent years was Von Ribbentrop, pseudo-intellectual and champagne salesman, who was of great use to the Nazi government in g: .ng an aura of respectability to international policies which, without a debonair front, might have been recognized readily for what they were: simple thuggery.

In America, the outstanding representative of this function is William F. Buckley, Jr., editor of The National Review and perennial political candidate. Buckley got his start as a smart young "intellectual" by writing a book, God and Man at Yale, upon graduating from his alma mater. The book has been soundly exposed and condemned by professors and overseers and loyal alumni for falsely tweisting facts and for sheer malice. The National Review and his syndicated newspaper column, "On the Right," frequently print "news items" and interpretations picked up from the openly fascist journals and have been important and useful agencies for radical right attacks on honest liberals and conservatives.

Buckley has been caught out for misquotations (with quotation marks!) and for repeating radical right malice and rumor, but he never admits a mistake or apologizes to the victims. Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and nothing else to do. Reynolds won his suit, of course, but it took all of his time and resources for most of three years, and he died shortly thereafter.

Although the opinion never precisely fastens upon a single description of the allegedly libelous language (See 394 F. Supp. at 924-25, 929, 940-41; AII 540-41, 545, 556-57), Judge Griesa appears to have found that the passage libeled Buckley in three respects:

1) It labeled him a fellow traveler of totalitarian fascism.

2) It accused him of deliberately misusing his position as a prominent journalist to purvey materials from openly fascist journals under the guise of responsible conservatism.

3) It charged him with engaging in the same type of libelous journalism against several individuals as Westbrook Pegler practiced against Quentin Reynolds.

The Parties

It was stipulated at the trial that plaintiff William F. Buckley, Jr., is a "public figure." (394 F. Supp. at 922; AII 538). One witness described him as "a preeminent figure" in the American "political dialogue today" and as one of the "major figures" in 1969 (AI 279). He has also been a "public official," having served as a United States official at the United Nations and on the Advisory Committee on Information of the United States Information Agency. He also was a candidate for mayor of New York City in 1965 and for the Yale University Board of Trustees (394 F. Supp. at 922; AII 538; AI 99, 165).

Buckley is the founder, owner and editor-in-chief of National Review, a fortnightly political journal. Its circulation now is about 110,000; in 1968-69, during the period involved in this suit, it was over 100,000. The National Review organization also publishes a newsletter devoted to the same ends on alternate weeks. Buckley is in ultimate control of everything published by the organization (AI 83-84; 128). Buckley is the author of a newspaper column entitled On the Right, carried three times a week by 350 newspapers throughout the country, about 100 more than carried it in 1968-69. It is now the second most widely sold political column, trailing only Jack Anderson; in 1968-69 it ranked third (394 F. Supp. at 922; AII 538).

The Buckley communications empire includes broadcast as well as print media. He hosts a weekly television show, Firing Line, carried by about 75 commercial stations in 1969, and now broadcast by 200 Public Broadcast Service affiliates. He is chairman of the board and part owner of the Starr Broadcasting Group, which owns radio and television stations and a book publishing company (394 F. Supp. at 922; AII 538).

Buckley has written ten books,[2/] edited four more, and contributed to still others. He has also written numerous magazine articles. He delivers between 50 and 60 lectures annually.

2/ Now eleven. See New York Times Book Review, Sept. 28, 1975, p. 3.

He frequently appears as a guest on television and radio programs (394 F. Supp. at 922; AII 538).

Although the complaint alleged that because of the libel, Buckley was "greatly injured in his good name and reputation and held up to public scorn, hatred, disgrace, scandal, contempt and dishonor" (AI 5), Buckley does not know of anyone who thought less of him after reading Wild Tongues (AI 193). Buckley made no attempt to prove any special damages such as actual harm to his reputation or business interests. The court below also found insufficient evidence to award more than nominal general damages of $1.00 for presumed impairment of plaintiff's reputation (394 F. Supp. at 945; AII 561). Indeed, according to plaintiff's reputation witness, Buckley's prestige and influence have actually increased substantially since the time Wild Tongues was written (AI 65-69).

Defendant Franklin H. Littell is a prominent theologian who is actively involved in political affairs. Though not approaching Buckley's fame as a celebrity, Dr. Littell might well be found a "public figure" too. Since 1969 he has been a professor in the Department of Religion at Temple University in Philadelphia. He was ordained a Methodist minister in 1941 and received a Ph.D. in church history from Yale in 1946.

Littell has served his church, his country, and the ecumenical

cause in many capacities. He has taught at a number of universities and theological schools. As President of Iowa Wesleyan College for three years he completely reorganized the school and was offered its presidency for life. He has preached and lectured throughout the United States and Europe. He is program chairman of a bicentennial international conference on religious liberty to be held in Philadelphia in 1976 (AII 492-99).

For ten years in the 1940's and 50's Littell worked for the United States Government in Europe. He was chief Protestant advisor to the United States High Commissioner in Germany, and held other posts (AII 3, 479-91a).

Littell's primary interests lie in the areas of religious freedom, interfaith cooperation, the relationship of church and state, particularly the "church struggle" of all religions against totalitarian communist and fascist governments and other anti-religious forces, and in the education and training of lay religious leaders. He had written twelve books (several published in German) and hundreds of articles at the time of the trial (AII 469-99). He is an expert in the field dealt with in Wild Tongues (Test. of Clement Alexander, 4/23/74, at jgh 20). However, Littell testified that "Wild Tongues is the only book that I have published which I conceived and have thought of as a political tract, a tract for the times rather than something that was distinctly scholarly or church-

ly " (AII 440, 497).

Littell became involved in political affairs through this religious work. Over the years, his concern was aroused more and more by the threat he saw posed by extremist groups and individuals to organized religion and to democratic society upon which he believed freedom of religion depended. He had observed firsthand the impact of communism on religious and political freedom in Eastern Europe and had studied in great depth and talked with participants in the struggle against fascism in Western Europe.

In this country, Littell intensely studied individuals and organizations he believed were totalitarian in nature or outlook. He read many books and articles on the subject. He kept track of the various journals published by totalitarian groups. Most importantly, each year he gave a graduate seminar on the subject; through his students' and various assistants' and associates' research into the goals and relationships of totalitarian groups, he gained very extensive knowledge of their operations (See, e.g., AII 99-104, 152-55, 158, 342-43, 378-79).

Ultimately, to fight against totalitarian influences in American religious and political life, Littell became chairman in 1966 of a newly-formed organization, the Institute for American Democracy (IAD). The IAD intended to teach Americans what Littell firmly believed--that "liberals and conservatives have more in

common with each other than either one of them" has with the "disciplined cadres" and "fellow travelers" of the extreme left and right which seek to undermine both religious and political freedom and institutions (AII 499-500).

Thus, for Littell the writing of Wild Tongues became part of a "counter crusade," a "Church struggle [he] was living with " (AII 366). Like the IAD, the book was intended to demonstrate that "the threat from totalitarianism is a real threat even in America and we should take seriously the danger from extremists of the left . . . and extremists from the right " (AII 83).

Proof of Defamatory Falsehood

Plaintiff's initial burden was to show the passage was libelous. Buckley was his own first witness.[3/]

According to Buckley, the term "fascism" applies to movements relying on force, deception and racism to gain power, and which seek to remain in power by exercising complete control over the whole apparatus--executive, legislative and judicial--of the state. Buckley maintained the "radical right" was significantly different.

3/ Despite his status as a party and over objection (AI 48-51; 70) Buckley was permitted to testify as to what he thought the allegedly libelous passage meant. The district judge explained that the terms used in the passage were rather vague and so it was important to introduce evidence of what they meant. Buckley described his understanding of key terms such as fascism, radical right, and fellow traveler (e.g., AI 16-19; 68-71; 93-98; 260), but it remains unclear whether he did so as an expert or as a fact witness.

This term denotes highly dissatisfied persons who may share many of the irresponsible and reactionary political goals of fascism but who do not advocate the overthrow and control of government by brute force (AI 16-19; 93-98; 166; 249; 260).

Buckley believed that it is "absolutely crucial" to his career that he be known as a "responsible conservative" (conservatism is defined at AI 16) not allied with fascism or the radical right, and as a careful, logical, responsible journalist and political analyst (AI 18, 29-31).

On the other hand, Buckley admitted he has "heard it said" that he is a member of the radical right or that he aids and abets the radical right although he has not seen this in a "responsible newspaper " (AI 124-26). Buckley acknowledged he has been accused of supporting "totalitarian" positions (AI 170). Furthermore, he admitted that he had in the past erroneously labeled someone as "fascist" and sloppily used "totalitarian" to describe him (AI 166-169). Apparently the victim did not sue Buckley.

Buckley introduced no evidence to show how an average reader of the book--as opposed to a knowledgeable journalist or political expert--would understand the allegedly libelous passage. In attempting to prove the falsity of the statements in the passage, plaintiff called Allard Lowenstein, a former Democratic Congressman, as a reputation witness. However, as to the period before 1968

(i.e., most of the time at issue here), Lowenstein spoke not from his "personal experiences" but rather "about a general reputation . . . from what he knew of Buckley as a public figure" (AI 276). Lowenstein testified that Buckley did not have a reputation as a member of the radical right or an aider of fascism (AI 268).

But Lowenstein also admitted he has heard it said that Buckley is a fellow traveler of the radical right (AI 71-75). Indeed, about Buckley, like any public figure "you will hear different views . . . . you can hear anything said by somebody " (AI 71-74). And when pressed, Lowenstein would not "say categorically that anyone who used those statements [the alleged libelous passage] was irresponsible." He considered that "those statements as statements are irresponsible " (AI 282).

Other witnesses for Buckley testified that if the statements made by Littell came to be generally believed, he would lose the audience and market for Firing Line and On the Right. They stated that the accusations in Wild Tongues are false (394 F. Supp at 931; AII 547).[4/]

4/ Because of a mistake by the court reporter, the testimony of these witnesses (Steibel and Elmlark), although ordered, had not been transcribed at the time this brief was filed.

Proof of Malice

In order to prove that the statements in Wild Tongues, if false, were made by Littell with knowledge of their falsity or in reckless disregard of the truth, Buckley produced little evidence other than the testimony of Littell, who was called as plaintiff's witness. No other witness was called to show Littell's state of mind when he wrote the book.

The main non-testimonial items introduced by Buckley were a series of letters Littell wrote Buckley in 1967-68 which characterized Buckley as an "honest non-fascist conservative." (394 F. Supp. at 937-38; AII 553-54; Ex. 15A, 17). Littell explained that these expressions were merely diplomatic compliments "appropriate to [his] first approach to Buckley (AII 308, 312, 320).

Buckley as Fascist Fellow Traveler

As plaintiff's witness, Littell testified that he did not believe Buckley was a fellow traveler of fascism and that he never intended to say that in Wild Tongues (AII 49, 52, 55, 62, 240-41). He did consider Buckley a fellow traveler of the radical right; in Littell's metaphor, a "rogue comet" "heavily in their magnetic orbit." (AI 54-55, 57, 66; AII 62, 240-41, 267-68, 520-22). By this he meant that Buckley, while not a member of any particular right-wing organization, generally advocated the same position as and supported in some degree most of the actions of such groups,

particularly the attacks they made on figures in the center of the political spectrum, although making more sophisticated arguments than they did. For what it was worth, Littell agreed with Buckley that the radical right and fascists were different (AII 5-6, 50 237-42, 518-20).

Although Littell scorns ideology and following a preset line in political decisions (see e.g., AII 290, 502-03), he found Buckley's relations with the right wing disturbing because "a real Conservative, like a real Liberal, should never do anything to help or assist fronts of either the Right Wing or the Left Wing." (AII 283; see also AII 520).

Most of Littell's seven days on the witness stand were taken up not with abstract political theorizing, but in complying with the demand of plaintiff and the court to produce everything which helped him form his judgment about Buckley expressed in the allegedly libelous passage (See, e.g., AII 67-68, 70-74, 118, 145, 196-201, 393-97). Apparently the intention was to prove "actual malice" by showing that Littell drew incorrect conclusions, as expressed in the passage, from all the material he had seen by and about Buckley for twenty years before he wrote the book; the question repeatedly asked was whether statements in the text were supported or justified by particular documents Littell thought he had seen.

Protesting that he had no way of recalling everything that formed his judgment (see, e.g., AII 118, 145, 393-97), and that the items he submitted were only "representative" of what influenced him (AII 158-59), Littell tried to explain that political opinions are not usually based on isolated items:

> [W]e are dealing with what creates over a period of a number of years and out of 250 small evidences, a feeling, and finally an opinion, as to what you are dealing with (AII 123).

He felt that there were

> a whole number of articles . . . in the National Review particularly in its earlier years featuring persons . . . who have subsequently pushed to the ultimate logic their extremist positions. A person who edits a magazine like that, who issue after issue after issue and dozens of times in the course of a five-year period features people who are later exposed as genuine first-water fascists seems to me to indicate something about the mental operation (AII 164-65).

Or again:

> By itself it [a National Review article] is nothing. But if you have an excessive pursuit of certain persons, if you present them always in the most disagreeable and contemptuous light, if you have dozens and dozens and dozens of such things, even though no one by itself really amounts to that much, then you have a picture (AII 233-34).

Littell attempted to comply with the demands, however. He produced articles written or edited by Buckley showing his concurrence in goals advocated by, and in activities of, the right (See e.g., AII 7-8, 159-60, 161-63, 223,25, 231-33, 247-52, 283 Other items showed Buckley implying that various persons whom Littell considered very constructive in their views and actions were communist sympathizers or otherwise subjecting them to "scurrilous attack" (See, e.g. AII 166-76, 182-83, 189-90). He showed that other authors pointed to similar incidents and had reached similar conclusions (AII 48, 59-66, 113-120, 121-22, 127-32). He showed that the National Review had often published articles by, and that Buckley joined in organizations or informal gatherings with, far right wingers (See e.g. AII 10-12, 22-31, 152-53, 160-61 163-65). He testified that even though Buckley claimed he had broken with the John Birch Society (AII 467) in 1965, he considered Buckley's break less than complete (AII 37, 261-63, 280-82, 467-69). He pointed to the use in 1968 of the National Review for one of its mailings of the same addressograph nameplates as a John Birch Society office (AII 397-98).

It was these kinds of things which Littell felt showed Buckley's sympathies for the far right wing. But equally important was the high regard in which the far right held Buckley. For exam-

ple, Littell was disturbed by the fact that various right wing groups indicated their agreement with Buckley's positions by selecting him as a representative to meet President Johnson (AII 91-95), by distributing his books (AII 95-98), by carrying his column in their publications (AII 13, 15, 17, 145-59), by referring to Buckley's writings as authoritative sources (AII 513-14), and by urging others to subscribe to the National Review (AII 151). The John Birch Society told its members to write airlines demanding that they provide the National Review for passengers to read (AII 514). As was suggested by counsel's questions regarding these items, Buckley might well have had no knowledge of or way to control such uses of his name or writings (See e.g., AII 17, 94, 104). What Littell considered important, however, was the kind of people who chose to support and push Buckley'w work (AII 94-95, 97-98) and who were, in effect, making use of Buckley's work for their own purposes. When the Birch Society urged National Review on the airlines, Littell testified, "It certainly wasn't because they thought it was like Better Homes and Gardens or something. It was because they liked the line " (AII 514). This is what made Buckley publications "important and useful agencies for radical right attacks on honest liberals and conservatives,' as Wild Tongues put it, and in being such an agency over a long period of

time, whether intentionally or not, Littell believed Buckley could be described as a fellow traveler.

Buckley as Purveyor of Fascist Material

On the issue whether he deliberately purveyed material from fascist journals, Buckley denied the charge, claiming his positions are not inspired by the radical right (AI 7, 92, 238-39), and that he is not a "conveyor belt" for their ideas. But Buckley admitted he does pick up items appearing in the radical right or fascist press, although he said he does so only to "denounce" them, not with the intention of circulating them more widely (AI 77-81). And Buckley indicated that "[i]f a 'radical right organization' uncovered a piece of evidence which I thought should be introduced into the journalistic bloodst[r]eam, I would proceed to do so" (AI 91-92, 208-209).

In one case involving attacks on the IAD and Littell, Buckley admitted relying on research of the right-wing Church League of America (AI 143) and using a story from its newsletter, News & Views, as the basis for an article (P. Ex. 50; AI 198, 201-02). Littell thought the Church League probably was fascist (AII 271, 372-73, 376).

Allard Lowenstein denied that Buckley "directly prints news items and interpretations picked up from the openly fascist journals" (AI 268-69). Though he called the charge "outrageous,"

he conceded that "I don't know what the openly fascist journals are " (AI 269).

Littell, as plaintiff's witness, cited a number of instances where he thought Buckley took up attacks initiated by the right wing (See e.g., AII 142-43, 177-81, 230-31). Littell particularly remembered his own experiences as a subject of attacks by Buckley and the far right. These began shortly after the announcement of the formation of the IAD with Littell as its chairman in mid-November, 1966 (AII 297; D. Ex 11 & V). During the next two months, the IAD and Littell were attacked by many right wing broadcasts and publications, including the John Birch Society Bulletin (P. Ex 77), as well as by the National Review (P. Ex 75 ; AII 297-302). Littell's home and family were threatened and attacked (AII 300). Littell was accused of being a communist fellow traveler. In June 1968, News & Views attacked the IAD again, focusing on fundraising efforts for it by Steve Allen (P. Ex 94; AII 260). In July, Buckley's column carried similar criticism (P. Ex 23; AII 336). And in November 1968, National Review explicitly cited a News & Views attack on IAD (P. Ex 50, AI 198, 201-02; AII 338-40).

There were also many other items which Littell explained he could not "reconstruct honestly" because he just did not remember what "six years ago in a seminar some student brought in and pointed out parallels, although we did it all the time"(AII 351).

And Littell had noticed himself "ten, a dozen times where Mr. Buckley's writing showed a most marvelous parallel to what appeared in the other radical right journals" (AII 371, 379).

From his personal experience, from the items produced at trial, and from the many others which Littell could not honestly recall, Littell concluded "that certain points, certain phrases, certain interpretations would appear in Buckley's column, in the magazine [i.e., National Review], at the same time or virtually the same time that it came in . . . the Birch Scoiety Bulletin, came in News & Views of the Church League, came in Billy James Hargis' publication, in Carl McIntyre's publication. Not every time, but the same stories, the same lines, the same connections, real or fancy, would appear in a whole [n]etwork" (AII 368-69, 369-72).

Based on Buckley's explicit reliance on News & Views in the November 1968 attack on IAD (P. Ex. 50), and on other parallels Littell perceived between that publication and Buckley's writings, Littell believed that the Church League of America was "the source of [Buckley's] analysis of American Protestantism" and that "Buckley is on cordial fraternal relations" with the Church League and Edgar Bundy, its founder (AII 78-79, 301-02). Any connection with the Church League was abhorrent to Littell. He belived that organization was a front "used extensively by the John Birch Society" as

"the major center of att ck on the National Council of Churches and the ecumenical movement generally in this country " (AII 77, 79, 302). Littell was prominent in these religious circles. He had "a whole file on the Church League of American attacking me, my church, my bishop and other leaders of American Protestantism" (AII 78). With the Church League in mind, he testified that "the overriding theme in my mind when I wrote the book was the church struggle with attacks being made from without and within (AII 376).

The question arose whether Littell believed Buckley knowingly tried to hide the supposed disreputable provenance of some of his articles. Littell testified he did not believe this (AII 272). What he did think was that Buckley picked up "items and emphases" from journals which Littell considered "openly Fascist" such as the John Birch Society Bulletin and News & Views (AII 271-72). Littell did not intend to accuse Buckley of intentionally deceptive use of his responsible journalistic position because he did not believe this. He believed Buckly picked up the writings "because he was sympathetic generally to this. . . . I wouldn't say he did it as a cover-up. I would say he did it generally because he agreed with them ideologically. But not always. . . . I think he is sincere in what he is doing " (AII 272-73).

Buckley as Libeler

With respect to the sentence comparing him to Westbrook Pegler,

Buckley testified that "there is nobody about whom I have lied ever, not to mention day after day, at least not intentionally" (AI 100). Buckley has found it necessary, however, to publish numerous apologies and corrections in the National Review (AI 107-111). Buckley admitted he had used his publications to wage campaigns against "lots of people" (AI 100). And he testified he had "goaded" Linus Pauling into a lawsuit (AI 101). Furthermore, Buckley has actually been sued for libel by a number of people (AI 183-85), while others have threatened to do so (AI 232). In at least one suit, Buckley made a substantial cash settlement out of court (AI 184, 241-42). Although Pauling's suit against Buckley had been dismissed by the time Wild Tongues was written, Gore Vidal's counterclaim charging libel was not disposed of until 1972(AI 180-81).

Allard Lowenstein denied that Buckley had a reputation for misquoting people, for lying about people, for engaging in personal vendettas, or for never admitting a mistake where an apology was warranted (AI 273-74). But Lowenstein had heard it said that Buckley misquotes and distorts people's views (AI 297). In fact, he testified that such accusations are not uncommon and "are to be expected by people in public life " (AI 298).

Buckley produced no evidence independent of Littell's testimony to show actual malice in the making of the Pegler reference.

Littell testified that he intended in the passage to criticize Buckley's "goading," "hounding" and "excessive pursuit" of many people for whom Littell had great respect and a number of whom he knew personally (See e.g. AII 233-35, 415-22, 453, 458-60).

Littell strongly denied that he intended to say Buckley lied day after day, in the sense of printing inaccurate facts about individuals, as did Pegler, as the court later found (AII 417, 460-61). He testified that if he wanted to say that Buckley lies every day, he would have written the sentence, "[L]ike Westbrook Pegler, William Buckley lied day after day. . . ." (AII 417). Nor did he intend to accuse Buckley of making the particular kinds of charges (cowardice, sexual misconduct, etc.) which Pegler made against Reynolds (AII 420-21, 456-57).

To support the statements he believed he had made, Littell cited Buckley publications which he believed implied people were communists. The victims of these smears included Littell's personal friends Bayard Rustin, Rev. A. J. Muste and Dorothy Day (AII 166-72, 417-19). Littell described Muste and Day as "two of the most saintly people that we have had in the churches in the last 75 years" (AII 171-72).

Particularly odious to Littell were repeated slurs on Martin Luther King, Jr., and frequent gross misrepresentations of his positions, amounting in the general sense to lies. Littell had

the greatest respect for King, who was once his student. While Littell acknowledged, for example, that Buckley's article concerning King's assassination expressed great sorrow, he considered it "nihilistic in the worst sense" to equate, as Buckley did, King's conscience with James Earl Ray's, irrespective of any disagreements on political issues (AII 135-38, 419-20).

Littell believed Buckley repeatedly and obsessively published half-truths and heavily shaded articles about King and the Kennedy brothers. These did not include "just a little misrepresenting or a little shading," but rather Littell felt Buckley "really set out to say something . . . which isn't true" "again and again and again, and obsessively." According to Littell, this "falls within the general category of lying" (AII 415-16). Buckley "never lost a chance to write" King and the Kennedys "into the ground and to treat [them] contemptuously" (AII 235).

Littell was thinking when he wrote the passages "that if you grossly and deliberately misrepresent somebody, like accusing Martin Luther King of being a doctor of lawbreaking and being an anarchist and a disciple of violence, and so forth, well that's a lie. It is a certain theoretical level lie instead of a really precise detailed lie" (AII 459; see also AII 220-22).

Littell emphatically denied having read the description of the Pegler-Reynolds affair in Louis Nizer's book My Life in Court

(AII 416, 445, 448, 461). The judge relied on the book over objection, to ascertain how a reader of Wild Tongues would have interpreted the Pegler reference (AII 445-47; 394 F. Supp. at 929; AII 545). Yet the judge himself and defense counsel at trial both had only the haziest recollections of the Pegler-Reynolds affair (AI 62-63; II 447, 462).[5/] Littell had read some other brief description of that case before writing the passage (AII 416, 445, 448, 461). He testified that when he wrote the passage he had in mind the fact that Buckley "relentlessly, obsessively, went after" King, and he saw this as similar to Pegler's goading and hounding of Reynolds for the latter's alleged cowardice as a war correspondent (See AII 220-22, 415-21, 443, 452-61). Although he reacted less strongly, Littell felt Buckley did the same thing to the Kennedys (AII 235, 453, 456, 460).

Also on Littell's mind when he wrote the "Pegler" passage were his own experiences with Buckley.[6/] In addition to the

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5/ The judge's offhand recollection of Von Ribbentrop was similarly vague (AI 73). Plaintiffs also objected to introduction of the Encyclopedia Brittanica entry on the Nazi official (Test. of Clement Alexander, 4/23/74 at jgh 33).

6/ These were less important than the material previously discussed, however. When asked whether his own experience was the predominant thing in his mind when he wrote the passage, he replied:

> Well, I think one remembers what has happened to him more than he remembers what happens to others. But I would say the one thing that really burnt me more than anything else was the obsessive attacks and utterly unjust attacks on Martin Luther King, Jr. (AII 443).

material directly involving the IAD discussed above, Buckley attacked Littell in another way during the same period. The incident began in August 1967 when National Review carried a brief report (P. Ex. 14), based on a newspaper article (AI 31; P. Ex. 16B), which inaccurately stated that Littell had given a speech (at most it was read in his absence) calling "right-wingers" disloyal and advocating that they be "muted and rendered ineffective" (AI 133-34, 147). Littell wrote to Buckley (D. Ex. B) protesting the inaccuracy and the fact the article misleadingly indicated Littell attacked only the right, rather than both left and right. Letters were exchanged, and in an On the Right piece called "Who Are the Totalitarians" in February 1968 (D. Ex. A) Buckley sharply criticized the IAD and Littell. Based only on their correspondence and the text of the proposed speech, Buckley called Littell "an abusive rhetorician." (AI 141). The article also misquoted the proposed speech again (AI 85-88, 148-50). The following month another column (D. Ex. D) quoted excerpts from the Buckley-Littell war of letters, criticizing Littell and implying he had taken leave of his senses (AI 152-58). Buckley left out the first paragraph of Littell's letter (P. Ex. 17) which argued that honest conservatives and honest liberals should stand together against extremist elements because "it's cant. . . . I don't republish banalities," (AI 153), yet this was the point Littell believed was most important.

In any event, Littell did not consider the reference a legal judgment, although he did think that some people Buckley attacked could well have made libel claims (AII 417, 441-42). He testified:

> What I had in mind when I wrote the passage is that some very good people had been treated with utter injustice and I felt that they deserved some protection. . . . [T]here ought to be some way that they could get back at Mr. Buckley. Of course, it is purely theorectical because Dorothy Day is a Sermon on the Mount Christian and she wouldn't go to court if somebody hit her on the head. Muste is an absolute pacifist. He wouldn't go to court.
>
> It wasn't a legal judgment so much as an expression of feeling, if you will (AII 442-43).

ARGUMENT

I

Appellant's Public Statements About Issues of Compelling Public Interest, Concerning the Public Views of a Leading Public Figure, Are Protected Against an Action for Libel by the First Amendment

The irreducible lesson of New York Times v. Sullivan, 376 U.S. 254 (1964), repeated time and again over the past decade, is the

> profound national commitment to the principle that debate in public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks . . . 376 U.S. at 271.

A central lesson of Gertz v. Welch, 418 U.S. 323, 339 (1974), is that:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of the judges and juries but on the competition of other ideas.7/

These excerpts express the policy of the Supreme Court to

7/ Times v. Sullivan also recognized this constitutionally significant distinction between fact and opinion. 376 U.S. at 271 and at 292 n. 30.

promote the interests of freedom of debate at the expense of lawsuits for libel; to elevate the social utility of the First Amendment at the expense of injury to personality felt by targets of political expression; and to recognize that whoever dwells in the marketplace of ideas puts his reputation in jeopardy. ". . . [P]ublic figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them" Gertz v. Welch, supra at 345.

The principle of unfettered public debate of public issues clashes with the law's protection of reputation through application of the doctrine of libel. To serve the former interest, however, the Supreme Court has held that a public figure or official can recover for defamatory falsehood only by showing that false and injurious facts were asserted with knowledge of their falsity or with reckless disregard of whether they were true or false. That test is not easy to satisfy nor was it intended to be.[8/] Its stringency is a reflection of the Court's view that criticism of public officials or public figures is affirm-

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8/ See New York Times v. Sullivan, supra at 283-88; Rosenblatt v. Baer, 383 U.S. 75 (1966); Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967); Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Pub. Co. v. Bresler, 398 U.S. 6 (1970); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Time Inc. v. Pape, 401 U.S. 279 (1971); Ocala Star Banner v. Damron, 401 U.S. 295 (1971); Gertz v. Welch, supra at 342.

atively to be encouraged by assuring citizens of substantial protection against libel suits by imposition of a heavy and discouraging burden upon those who might entertain the idea of a punitive expedition to the law courts.

The constitutional bias in favor of unfettered speech at the expense of compensation for harm to reputation is applicable at least as much to the case at bar as to any of the leading libel cases decided since Times v. Sullivan. See note 8, supra. All of those cases were of great First Amendment importance. In Ocala Star Banner, for example, the Supreme Court noted that "Public discussion about the qualifications of a candidate for official office presents what is probably the strongest possible case for application of the New York Times rule." 401 U.S. at 300-01. But the subject matter of those cases was surely no more important than the subject matter of this case. Except for Butts, they all involved the qualification of individuals to serve as local elected or appointed officials. As such, the scope of the criticism was necessarily of moderate and finite dimension. The scope of the subject matter from which this case arises, however, is much broader and of proportionately greater significance, for it consists not of a debate over whether one candidate for office is preferable to another, but of a debate about systems of government, about democracy

vs. totalitarianism, and about the continuation of the freedom of religious worship. Those are not subjects of modest dimension. They implicate a whole range of philosophical, political, social, ethical and religious considerations. They include facts, certainly, but their dominant theme by definition must necessarily include a vast range of opinion also. One who chooses to discuss those subjects, chooses to involve abstractions and principles, moreso, for example, than does one who debates the dubious financial activities of a recreation-center supervisor or a local land development venture. There must therefore be a more flexible scope given to such speech than is given even to debate involving local political affairs, for the discussion proceeds on a more abstract and theoretical level and requires more tentative, exploratory, critical and often disagreeable excursions into the dogma of others. The notion was partially captured in Cantwell v. Connecticut, 310 U.S. 296, 310 quoted in Times v. Sullivan, supra at 271:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exxageration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.

To impede discussion on that grand scale by overhanging threats of libel suits, certainly interferes with "the essence of self-government," Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964), at the most profound level.

The special characteristics of the plaintiff in this case must also bear significantly on the outcome of the appeal, for as the Supreme Court has recognized, "The courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense. See Brewer v. Hearst Publishing Co., 185 F. 2d 846." Curtis Publishing Company v. Butts, supra at 154 (Harlan, J.)

Buckley is and has been both a public official and a public figure, though in this case he appears predominantly in the latter capacity. But Buckley is not your garden variety public figure who has entered the public arena to participate in public affairs to one limited degree or another. Compare Walker v. Associated Press, 388 U.S. 130 (1967). He is a public figure of dazzling dimension, influence and presence. He is owner and editor of National Review which had a circulation of 100,000 in 1968-69 and has a present circulation of 110,000. His newspaper column appears thrice weekly. He is the host of a weekly TV show.

He has written and published ten books, edited four others, contributed material to other books and magazines, delivers 50 to 60 lectures a year, and is chairman of the board and part owner of a corporation which owns radio and television stations and a book publishing company (394 F. Supp. at 922; AII. 538).

The contents of virtually all of this vast output by Buckley is political. As the Court may notice, Buckley's politics may be described as conservative, though others might denominate him right-wing, radical right-wing, or --we dare say--fascist, depending on who is speaking. Indeed, he must fairly be described (though the court below neglected to do so anywhere in its opinion) as the nation's leading advocate, propagandist, ideologue and theoretician of right-wing political beliefs and ideas.

This vast output by Buckley bears directly upon a central thesis underlying the New York Times principle: that truth will emerge from the clash or argument and counterargument in the marketplace, and that public officials and public figures have "sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." Curtis Pub. Co. v. Butts, supra at 155 (Harlan, J.). Mr. Chief Justice Warren, concurring, repeated the same

idea: ". . . '[P]ublic figures' have as ready access as 'public officials to mass media of communication, both to influence policy and to counter criticism of their views and activities."[9/] The Chief Justice went on to point out that the fact that [public figures] are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest [in the conduct of public figures], since it means that public opinion may be the only instrument by which society can attempt to influence their conduct." 388 U.S. at 164.

Mr. Justice Powell adverted again to precisely the same principle in Gertz. Declaring that the first remedy of any victim of criticism is to use available opportunities to rebut, he makes the special point that "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally do." 418 U.S. at 344.

Given the powerful constitutional considerations

9/ Actually ". . . any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official." Pauling v. Globe-Democrat, 362 F. 2d 188, 196 (8th Cir. 1966).

identified above, there should be the strongest presumption that any public figure engaged pervasively in public debate, who has a vast assortment of means of communication literally at his fingertips as does Buckley, is not entitled to invoke the power of the courts to protect his reputation. That presumption rests upon elementary First Amendement considerations which prefer that disputes of this dimension, involving participants who are engaged in the quintessence of public controversy concerning charges rooted in ideological disagreement, be resolved in the public fora. Since the means of doing that are, to say the least, easily at Buckley's disposal, he should be remanded to the marketplace and prohibited from burdening the exercise of free speech by imposing staggering money damages upon one of his ideological opponents.

Given the purposes of the First Amendement limits on libel actions by public figures, given the subject matter of the debate between the parties in this case, given Buckley's leading role as a right-wing advocate, propagandist, ideologue, and theoretician, and given the vast network of communications under his immediate control, his right to burden speech by employing the courts for vindication of his allegedly injured reputation must, as a constitutional matter be carefully examined. Three conclusions follow from such a careful

examination: [10/]

(1) Buckley is libel-proof;

(2) Appellant's statements must be regarded as protected opinion, epithet and rhetoric; and

(3) Appellant's statements, if factual, are true or, if false, were not made with constitutional malice.

II

Buckley is libel-proof

In Cardillo v. Doubleday, 518 F. 2d 638 (1975), this Court held that a plaintiff in a libel action, based upon references to him in a book about the Mafia, was "for purposes of this case, libel-proof, i.e., so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations." After reviewing the plaintiff's long life of crime, the court concluded that "we cannot envision any jury awarding or court sustaining, an award under any circumstances for more than a few cents' damages. . ." Id. at 640. That principle is applicable in this case.

10/ In libel cases appellate courts will "re-examine the evidentiary basis" of the lower court decision. Time, Inc. v. Pape, supra at 384. The scope of the review in this case is the broadest possible since it was tried to the court.

The rationale of Cardillo is that his history was so disreputable that the court could not envisage further damage by anything published about him. Having spent a life immersed in crime, the plaintiff had forfeited his claim to be free of injury to his reputation. Buckley, having spent a life immersed in politics, having chosen to be the principal spokesman for a controversial political position, and having become an extraordinarily prominent political figure, the court should hold that he too has forfeited his right to be free of attacks upon his reputation, when they relate to his political ideology and activities.

"The clash of reputations" is part of the political process. Monitor Patriot Co. v. Roy, supra. at 275. But the Supreme Court had gone beyond that notion as early as in New York Times v. Sullivan where it recognized that "criticism . . . does not lose its constitutional protection merely because it is effective criticism and hence diminishes . . . reputations." Supra at 273. That is to say, the Court recognizes that a constitutionally protected objective of political debate is to inflict harm upon one's political opponent and his ideology. Buckley has spent a lifetime at that occupation, with liberals, Marxists, and all variety of

leftists as his intended victims. 11/ He is, of course, protected in that activity by the First Amendment.

Buckley's world is an arena for monumental struggle between the left and the right; but whoever participates in that struggle must expect to be attacked and also to be wounded. Politics is not a tea party, certainly not in Buckley's league. The court should therefore hold that when one voluntarily involves himself in political debate to the extent that Buckley has, he forfeits the right to claim damage to his reputation by defamatory falsehood for any statements that relate to his public activities. The principles which inform New York Times v. Sullivan and its successor cases, support that conclusion. See Gertz v. Welch, at 345-46.

III

Appellant's statements must be regarded as protected opinion, epithet and rhetoric.

Appellant is a clergyman, college administrator and teacher. Many of his interests revolve around the public activities of the Protestant Church and the defense of

11/ It was recently said of Buckley in a review of his newest book that he "slithers venomously across the usual broad terrain of sacred and secular topics. Nobody demolishes easy targets more skillfully than he does--. . ." The New York Times Book Review, September 28, 1975, p. 3.

those activities. He hotly opposes both the radical right and left wings of the political spectrum, believing they pose grave threats to religious and political liberty. The book which is the subject matter of this case was written as an attack upon the Church's enemies on the right and the left. Buckley and appellant are natural political antagonists because of their divergent views on a host of public matters; they would disagree on any number of political issues, and they each would hope and try to attract adherents to the views which they respectively advocate.

Part of public debate, as we have noted, is to do harm to your opponent's reputation. As the Supreme Court recognized, "The clash of reputation is the staple of election campaigns. . ." Monitor Patriot Co. v. Roy, supra at 275. Garrison v. Louisiana, 379 U.S. 64, 73-74 (1964), recognizes also that one does not shed constitutional protection by speaking out of hatred, ill will, or selfish political motives. Gertz re-emphasizes the protection of opinion for "There is no such thing as a false idea", and National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) [hereinafter Letter Carriers] re-emphasizes that rhetoric and epithet are constitutionally protected, specifically including the use of the term "fascist," in political debate (418 U.S. at 284). See also Julian v. American

Business Consultants, 2 N.Y. 2d 1, 9; 155 N.Y.S. 2d. 1, 9 (1956).

In light of New York Times v. Sullivan, Gertz, and Letter Carriers, the court should hold that all of the passage is the expression of political ideas, opinions and rhetoric which are protected against libel judgments by the First Amendment.

The trial court considered but rejected that claim, on the ground that appellant's statements about Buckley are "surely . . . questions of fact, and not merely ideas" (394 F. Supp. at 943; AII. 559).

The trial court's conclusion was wrong. Though it acknowledged that "The boundary line between 'fact' and 'opinion'is obviously not a precise one" by failing to take sufficient account of the policies of the First Amendment which inform Times v. Sullivan, Gertz, Letter Carriers and the other leading cases, by failing to take sufficient account of the nature of the subject matter of the dispute between the parties, and by failing also to take sufficient account of the special characteristics of the plaintiff in this case, the trial court arrived incorrectly at the conclusion that appellant's statements were assertions of fact rather than opinion, rhetoric and epithet which must be protected under the First Amendment.

To call an ideological opponent a fellow traveler, to accuse him of using his publication to communicate the views of other ideological opponents, and to accuse him of lying, cannot be the basis of a libel judgment without inflicting fatal wounds upon fundamental First Amendment principles which protect not only "robust" speech, but "bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions." Linn v. Plant Guard Workers, 383 U.S. 53, 58 (1966), quoted in National Association of Letter Carriers v. Austin, supra at 272.[12/] The entire thrust of Letter Carriers, implicitly and explicitly, is to allow the use of the sharpest kind of language in political debate without requiring the speaker to demonstrate to the satisfaction of a judge or jury that, before speaking, he had closely researched the history of his opponent's political activities, decided carefully how to fit his own remarks to that history, avoided claims which might be thought inaccurate or irresponsible, censored his speech as would a doctoral candidate in his dissertation, and finally issued his statement in measured

12/ Though Linn and Letter Carriers were decided on federal labor law grounds, there is hardly any reason to doubt that the result would have been the same, or stronger, under the First Amendment. For example, the Letter Carriers decision frequently invokes Gertz and also states that the Linn Court explicitly adopted the standards of New York Times v. Sullivan 418 U.S. at 272.

and polite prose.

That, of course, is not how human events proceed. To the contrary, the First Amendment recognizes that "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies--like 'unfair' or 'fascist'--is not to falsify facts." Cafeteria Employees v. Angelos, 320 U.S. 293 (1943), quoted in Letter Carriers, supra at 284. 13/ First Amendment protection is extended to "rhetorical hyperbole," "vigorous epithet," and "lusty and imaginative expression," Letter Carriers, supra at 286, fully as much as to the most detached and lofty New York Times editorial.

A feature of the case which is especially distressing is the spectacle of appellant being required day after day at trial, to produce proof of the truth of every statement he made about Buckley. It is too close to a heresy trial for comfort. The need to avoid self-inflicted censorship that would surely flow from a speaker's fear of having to justify in court his every statement, is one of the major premises of New York Times v. Sullivan and its progeny.

13/ In Pauling v. National Review, 49 Misc. 2d 975, aff'd 22 N.Y. 2d 818 (Ct. of App. 1968), a libel action in which Buckley had called Dr. Linus Pauling a communist fellow traveler--among other things--was dismissed on motion for summary judgment on First Amendment grounds.

The variability of language, and its protected use under the First Amendment, was best described by Mr. Justice Harlan in Cohen v. California, 403 U.S. 15 (1971), which reversed a conviction for breach of the peace based on the defendant's wearing a jacket bearing the words "Fuck the Draft." Mr. Justice Harlan, at pages 24-26 of the opinion, noted in several different ways what is the essential argument of appellant in the case at bar. He described the First Amendment as "powerful medicine . . . designed and intended to remove government restraints from the arena of public discussion." He noted that it was a sign of national strength that the air was filled with "verbal cacophony." He recognized that "one man's vulgarity is another man's lyric"; that "words are often chosen as much for their emotive as their cognitive force, and that it is "one of the prerogatives of American citizenship . . . to criticize public men and measures--and that means not only informed and responsible criticism but the freedom to speak foolishly without moderation."

Buckley himself recognizes better than the trial court what this case is all about. During cross-examination of Buckley concerning a column in which he called the appellant "an abusive rhetorician," the following colloquy took place (AI. 142):

Q. But that's your opinion, correct?

A. What do you mean my opinion?

Q. That he was abusive, that Dr. Littell's letter is abusive.

A. Is there an opposite to an opinion in something like this? Is my opinion as distinguished from my what?

Q. That's just your opinion. You can answer yes or no.

A. No. I can't. You are playing rhetorical games with me and I choose not to submit. Do you mean there is a Bureau of Labor Standards or FDA on the basis of one can measure what is abusive (sic)?

IV

Appellant Did Not Make the Statements Attributed to Him by the Trial Court

The trial court's fundamental error in this case was its gross misinterpretation of what appellant's book said. The court effectively had to rewrite the entire book in order to find that appellant had expressed defamatory falsehoods about Buckley. The root of the error was in the court's disregard of the admonition by the New York Court of Appeals that "words may not be pressed out of their ordinary usage to sustain a charge of libel." Julian v. American Business Consultants, 2 N.Y. 2d 9, 11, 155 N.Y.S. 2d 1, 11 (1956). To the contrary, the trial court attached itself to the principle that "Courts will not strain to interpret [words alleged to be defamatory] in their mildest and most inoffensive sense."

394 F. Supp. at 925; AII. 541). That principle is incorrect in light of the demands of the First Amendment. See also Fleck Bros. Co. v. Sullivan, 385 F. 2d 223, 224 (7th Cir. 1967) ("Words allegedly libelous that are capable of being read innocently must be so read and declared non-actionable as a matter of law."); England v. Automatic Canteen Co., 349 F. 2d 989, 991 (1965).

We shall not engage in a protracted exegesis of text to show how the trial court misinterpreted the book. We are confident that this court's reading of the passage in issue, or of the entire book, in light of compelling First Amendment interests, will correspond with appellant's.[14/]

1. The fascist charge.

It was appellant's position throughout the trial that he had not referred to Buckley as a fascist fellow traveler, but as a fellow traveler of the radical right, but the trial court concluded that appellant had called Buckley "the outstanding representative in this country of the function of the fascist fellow traveler. . ."

14/ What little exegesis we do supply is actually academic since Buckley failed to carry his burden of proving the falsity of appellant's statements, whether as construed by the trial court or by the appellant. See part VB, infra.

On the question of proof, we stress that Buckley's principal witness, other than himself, was the appellant. Keeping in mind that the plaintiff in libel cases is constitutionally required to prove the elements of the tort, we invite the court to examine the record with care to determine whether, by calling the appellant as his own witness, Buckley has not in fact transferred to the defendant the burden of disproving each of the elements. We urge upon the court the notion that in these cases, where the First Amendment may be the real victim, the defendant, called as plaintiff's witness ought not be conisdered adverse or hostile. That is, if plaintiff chooses to try to make his case out of the mouth of the defendant, he should be bound to that testimony.

394 F. Supp. at 929; AII. 545.

During the trial, it was clear that everyone, including the judge, considered the terms "radical right," "fascist" and fellow traveler," to be very vague (See, e.g., AI. 16-17, 79, 92-98, 290-91) and perhaps not even libelous (See e.g., AI. 49-51). In order to find the "fellow traveler" accusation libelous, the trial judge read into the brief paragraphs pleaded in the complaint large parts of the rest of the book (See, e.g., AI. 179-80; 394 F. Supp. at 926-28; AII. 542-44). While the context of a defamatory statement certainly must be considered in ascertaining its meaning, the fact that Buckley pleaded only five paragraphs on pages 50-51 as defamatory must be given some effect. The whole book was not cited, but the judge felt free to range through every page, picking out whatever damag ng references he happened to come upon and fastening meanings gleaned from them to the more innocuous description of Buckley which does not even say specifically what he is a fellow traveler of.

It is unrealistic to think that an ordinary reader would flip back and forth--particularly look ahead--as the court does in its analysis, to ascertain what meanings Littell gives to every word in the passage. He would more likely have forgotten the three paragraphs mentioning Buckley's name by the time he got to the description of the malign characteristics of totalitarian movements. Certainly he would understand that those characteristics are not shared by every fascist, and obviously not by every fellow traveler.

In this part of his analysis, the judge carefully forgets that it is specifically stated in the paragraph following those cited in the complaint that Buckley is "not under the direct control of any subversive party " (Wild Tongues p. 52). Rather he aids them in reaching some of their goals.

To the extent that the court's conclusion rested upon the fact that Buckley's name first appears in the paragraph immediately following a discussion of the fellow traveling of Von Ribbentrop, it is no more persuasive. A coincidental physical proximity is inadequate to draw a conclusion whose effect is to punish speech.

We suggest that the trial court's error rests in part at least upon its having been misled by Buckley's complaint which emphasized that the libel was felt by Buckley to consist in having been called a "Nazi fellow traveler" and having been charged with favoring various "philosophies advocated by and associated with the Nazi party in Germany" (AI. 5). His attention having been focused from the outset on that claim, the contiguity between the names of Von Ribbentrop and Buckley seems to have interfered with a more detached reading of the passage by the trial judge.

The record is replete with testimony by the appellant that he considered Buckley to be heavily in the "orbit" of the radical right, and that the radical right drew sustenance from Buckley's publications (See pp. 13-18, supra). There is nothing in appellant's testimony that establishes that he believed Buckley was a fascist fellow traveler. See pp. 13-18, supra; part VB, infra.

2. The purveying charge

The trial court concluded that appellant's book "accuses Buckley of deliberately acting as a deceiver in the purveying of fascist material" (394 F. Supp. at 939; AII. 555). First, appellant's book said no such thing; second, if it did make a statement of that sort, it did not say that Buckley deliberately acted as a deceiver.

The closest the passage comes to saying what the court concluded it said is the last sentence of the fourth allegedly libelous paragraph:

> The National Review and his syndicated newspaper column, "On the Right," frequently prints "news items" and interpretations picked up from the openly fascist journals and have been important and useful agencies for radical right attacks on honest liberals and conservatives.

Two paragraphs earlier, the passage states generally, in describing the fellow traveler, that "he functions as a deceiver." The court brought together the two entirely independent phrases and blended them into one, to manufacture a defamatory falsehood. For all the sense the blending makes, the court might just as well have taken the word "feminine" which appears in the first paragraph of the passage and have transmuted the allegedly libelous passage so that it would read that Buckley was deliberately acting as a woman in the purveying of fascist material. We don't know if that would result in a greater or lesser defamatory falsehood, but it illustrates our point that, as a matter of arbitrarily moving words

about in a printed book, there must be some limit to a judge's literary license.

But if appellant said something like the court claims was said, he did not say that Buckley's deceit was "intentional." His testimony is clear on that point. He did not believe that Buckley deceptively used his responsible journalistic position. Rather, he believed that Buckley picked up material from journals appellant believed to be openly fascist "because he was sympathetic generally to this. . . . I wouldn't say he did it as a cover-up. I would say he did it generally because he agreed with them ideologically" (See p. 21, supra). Furthermore, appellant testified that in writing that Buckley's publications were "important and useful agencies for radical right attacks'" he had in mind the use the radical right made of those publications, such as urging the airlines to carry National Review. See p. 17, supra.

We think it is significant, in stressing the trial court's very strained textual construction, that Buckley's complaint did not even claim that this portion of the passage was defamatory. Paragraph 4 of the complaint (AI. 5), which consists of Buckley's allegations of the material he considers to be defamatory, makes no reference at all to the language concerning Buckley's printing of material from openly fascist journals.

There is nothing in appellant's testimony that establishes that he accused Buckley of "deliberately acting as a deceiver in the purveying of fascist material." See pp. 18-21, supra; part VB, infra.

3. The Lying Charge

The trial court concluded that "Buckley is accused of engaging in the type of libelous journalism practiced by Westbrook Pegler against Quentin Reynolds" (394 F. Supp. at 929; AII. 545). It is appellant's claim that he did say that Buckley lied, but he did not say that he lied with respect to the same subject matter (cowardice, fraud and improper sexual practices, among other things) as Pegler lied about Reynolds. See p. 23, supra. The construction of the relevant passage of appellant's book proves him right.

The subject of the passage is Pegler. Reference is made to the fairly notorious lawsuit brought against him by Reynolds, with no reference to the subject matter of that suit. Buckley is then introduced into the sentence, and it is clear that no connection is made grammatically between the subject matter of Pegler's lies and that of Buckley's. To relate the two is a very strained syntactical construction. As appellant demonstrated, if he wanted to say Buckley lied (like Pegler), there was a much better way to write the sentence. See p. 23, supra. There is no justification for the distorted interpretation either constitutionally or literarily.

Here too Buckley's complaint is illuminating. In paragraph 4 of the complaint describing the alleged defamations, it is pleaded only that the relevant passage of appellant's book charges that "falsity and malice have been employed by plaintiff as regards at least several people. . ." There is no suggestion in the complaint that Buckley read the passage as saying that appellant's defamation

consisted specifically of saying that he lied in precisely the same way and on the same subjects as Pegler. That was not, of course, what appellant was saying. What he was saying was simply that Buckley lied--in his own way. The evidence in this case shows, of course, that that is true. See p. 21-27, supra; part VB, infra.

V

"Actual Malice" Was Not Proved By Plaintiff at Trial By Clear and Convincing Evidence

Supreme Court cases hold that a plaintiff has met his burden of proof of "actual malice" only if he shows by clear and convincing evidence that the defendant published a defamatory statement knowing it to be false, i.e. "evidence of . . . deliberate falsification" (St. Amant v. Thompson, supra at 731), or if he shows that the statement was made with reckless disregard of its truth or falsity. Only "[T]he lie, knowingly and deliberately published" is unprotected. Garrison v. Louisiana, supra at 75. The defendant must be shown, with convincing clarity, to have published even though he had a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, supra at 75; Curtis Publishing Co. v. Butts, supra at 153 (Harlan, J.); St. Amant v. Thompson, supra at 731; Time, Inc. v. Pape, supra at 291. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published . . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" (emphasis added). St. Amant v. Thompson, supra; Time, Inc. v. Pape, supra, 401 U.S. at 291-92. The

standard of proof is extremely high. It requires proof of a calculated falsehood. These rules with respect to public figures and public officials were recently reaffirmed by the Court in Gertz v. Robert Welch, Inc., supra.

The only libel judgment obtained by a public official or public figure which has survived Supreme Court review is Curtis Publishing Co. v. Butts, supra. The evidence there disclosed that the publisher of the Saturday Evening Post was under pressure to produce a dramatic exposé to boost circulation. The writer assigned to the story about a football fix had little knowledge of the sport. The damaging allegations were based only on the affidavit of an informant with a criminal record indicating lack of veracity, telling a rather improbable story. The Post failed to verify the account with an available witness, to check objective evidence such as game films or to consult with football experts. No staff member even saw the informant's crucial notes of the incriminating conversation. 388 U.S. at 157-59. Prepublication warnings about the lies from Butts and his daughter were ignored. 388 U.S. at 161 n. 23. Finally, the article described in lurid detail a specific incident of grossly improper, if not criminal, behavior which the article itself recognized would, if true, destroy Butts' career. 388 U.S. at 135-37. See also 388 U.S. at 169-70 (Warren, Ch. J., concurring).

In Goldwater v. Ginzburg, supra, this court upheld a large libel verdict obtained by the 1964 Republican Presidential candidate. As in Butts, the evidence upon which liability was upheld disclosed appalling reportorial behavior apparently designed to hide or avoid learning the truth. Supra at 339-40. The defendants acted upon a preconceived plan to destroy Goldwater's character on psychological grounds. They published an entire magazine issue devoted to the candidate in the heat of the campaign. Only derogatory statements from various sources were used even when they were qualified by compliments. A poll of psychiatrists was conducted very sloppily, with a prejudicial covering letter, and the results were reported with gross inaccuracy. Ginzburg wrote the article making the extremely serious factual assertion that Goldwater had a paranoiac personality, buttressed with "facts" of dubious truthfulness, although he had no significant psychological training or knowledge. The article had not been reviewed by any expert. When asked to identify anonymous Goldwater aides who, according to the article, reached the same conclusions he did, Ginzburg could not. Authoritative warnings that the poll of psychiatrists was invalid were ignored. Supra at 328-337. Compare also Sprouse v. Clay Communication, Inc., 211 S.E. 2d 764 (1975), cert. den. 44 USLW 3197 (Oct. 6, 1975).

The facts in this case stand in sharp contrast. Appellant was writing a book from information he had collected over a long period of time. He was an expert in the field in which he was writing, see p. 8 supra, and he had studied it for years, unlike the authors in Butts and Goldwater. Any personal animosity toward Buckley was minimal (see, e.g., AII. 444) compared to the motives animating the publishers in the other cases. Appellant was relying not on biased or questionable sources, as in Butts and Goldwater but, for the most part, on Buckley's own writings and actions. His research may not have been exhaustive, but it was pursued over such a long period of time that surely appellant had a fair picture of Buckley's activities. While others might disagree with the conclusions appellant drew from the materials he relied upon, he never shut his eyes to the other side of the story, as did all three publishers discussed above. Appellant did not check his writing against his files, but New York Times v. Sullivan makes clear this is not essential. In any event, appellant's files obviously would only have confirmed his statements for he believed they supported what he thought he had written. The statements appellant made were neither outlandishly improbable nor particularly damaging on their face; they were general conclusions, not charges of specific factual conduct of some despicable sort,

as was the situation in the other cases discussed. In contrast to the prominence and timing of the libels in Sprouse and Goldwater, the passage about Buckley appeared on only two pages in the midst of a 184 page book, was not set up to attract any particular attention, and was not printed at a time calculated to hurt the alleged victim severely. The book was reviewed by counsel for Macmillan Co. who pronounced the relevant passage acceptable. Moreover, before writing the book, appellant had made inquiries concerning his fairly inchoate suspicions about Buckley's political orientation by writing directly to him at the suggestion of mutual friends (AII. 306-07). While that particular letter was not answered, it was at this time that the exchange of letters and the publication of the critical columns took place. These incidents could have had no effect other than to confirm appellant's suspicions about Buckley's right-wing inclinations and inaccurate and personally vindictive journalism. Thus in contrast to the other publishers who either failed to check their claims (Butts) or ignored the truths that investigation disclosed (Goldwater, Sprouse), appellant's initial suspicions were confirmed by his double checking. Pp. 25-26, supra.

The factual situation in this case is far removed from those in which liability has been upheld. To describe what

appellant wrote as knowing falsehood or reckless disregard of the truth ignores clear Supreme Court doctrine.

A. "Malice" was not proven.

The trial court's key finding of fact on the issue of actual malice rests on its conclusion that what appellant in fact wrote about Buckley exceeded by a substantial distance what he actually believed. 394 F. Supp. at 939; AII. 555.

After an exhausting and, as we claim, strained reading of appellant's book, the trial judge concluded that the passage in issue says in effect[15] that Buckley advocates anti-semitism, police state tactics and violent overthrow of government;[16] intentionally and deceptively circulates fascist material; and writes factual lies of the same kind that Pegler wrote of Reynolds. Since appellant testified that when he wrote Wild Tongues he did not believe either that Buckley was a fascist or subscribed to the characteristics of fascism referred to by the court; that Buckley did not

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15/ We say "in effect" since the passage certainly does not say it in haec verbae.

16/ The trial court makes that assertion (394 F. Supp. at 927-28; AII. 543-44) because appellant includes those characteristics in his book's definition of totalitarianism; but the court gives no credence to appellant's explanation that no one individual described as a fascist subscribes to all the different identifying characteristics. Id. at 929; AII. 545.

function as a deceiver in publishing material from fascist journals;[17] and that Buckley did not frequently lie about purely factual matters, the trial court reasoned that appellant must have written about Buckley knowing the statements were false, or with reckless disregard of their truth.

With respect to this conclusion, it should be noted that in the colloquies relied on by the court to make its findings about Littell's beliefs when he wrote the passage, the district judge asked the questions, and they were framed in virtually the same words the opinion uses to describe the meaning of the passage. This was fundamentally unfair in the First Amendment context here for two reasons. First, it was improper for the judge to have played such an adversarial role, in effect cross examining the defendant (who was being used to prove plaintiff's case as it was), on the basis of an undisclosed interpretation of the book. Second, as a matter of First Amendment law, it was improper to rely on evidence obtained from examination of the defendant about his actual belief as a substitute for proof of objective circumstances showing actual malice. Recklessness "is ordinarily nferred from objective facts" Washington Post Co. v. Keogh, 365 F. 2d 965, 968 (D.C. Cir. 1966)(Wright, J.), cert. denied 385 U.S. 1011 (1967). Cross examination of the defendant's witness cannot be relied upon to meet the plaintiff's burden of showing malice. Buckley v. Vidal,

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17/ Appellant testified that Buckley published such material openly because he believed it and wanted to circulate it. See p. 21, supra.

327 F. Supp. 1051, 1055 (S.D.N.Y., 1971); Cerrito v. Time, Inc. 302 F. Supp. 1071, 1076 (N.D. Cal. 1969) aff'd 449 F. 2d 306 (9th Cir. 1971) (dismissals on motions for summary judgment). In other cases, objective proof of actual malice has taken the form of asking defendants or their employees whether, e.g., they received certain communications or information giving facts contrary to those published.

On the theory on which it proceeded, the trial court necessarily had to find that appellant either knew what he wrote exceeded what he believed, or that he wrote with reckless disregard of what the words he used in fact said. As to each of the three libelous assertions, the court described appellant's testimony that he did not mean to say what the court found he had written as "difficult to credit" (394 F. Supp. at 933, 934, AII. 549,550).

Furthermore, in explaining its conclusion that appellant's testimony was "difficult to credit," the trial court said:

> It is hard to believe that words which have such a plain meaning were not intended by their author to have this meaning. At the very least, I must conclude that Littell was acting in reckless disregard of the truth when he used words which clearly spell fascism when he did not indeed believe they applied to Buckley (394 F. Supp. at 933; AII. 549).

This is a finding, in part at least, of "actual malice" from the very words ("words which have such a plain meaning"; "words which clearly spell fascism") of the alleged

libel. But malice may never be inferred from the content of the publication itself. Washington Post Co. v. Keogh, supra at 967, 969, citing New York Times v. Sullivan, supra. See also Greenbelt Cooperative Publishing Ass'n v. Bresler, supra at 10; Henry v. Collins, supra at 356 (disapproving jury instructions permitting, inter alia, inference of malice to be drawn from language of publication); Time, Inc. v. Pape, supra, at 285, 291 (disapproving reasoning of Court of Appeals which held malice could be found in omission of "alleged" from news story).

In each of the three alleged libels, the fact is, and the court must conclude, that, at worst, appellant was guilty of careless, negligent or even grossly negligent[18/] grammar, sentence structure and literary organization, for having written a political tract in which he intended to say one thing, and which was interpreted to mean something else. The fact that it was necessary for the trial judge to engage in a long and detailed textual analysis of the book, to import into the alleged libelous passage other sections of the book that had no reference to Buckley, and then have to discredit appellant's testimony even in face of the fact that there was absolutely no other evidence as to what the appellant believed or intended, requires reversal of the trial court's farfetched conclusions.

18/ See Miller v. News Syndicate, 445 F. 2d 356, 358 (2nd Cir. 1971).

Finally, we advert again to the issue of the burden of proof of establishing constitutional malice. That burden is the plaintiff's. In this case, his total proof of malice was attempted to be made out of the defendant's mouth; there was no other independent, extrinsic proof of that fact. The upshot of the plaintiff's tactic is that rather than shouldering the burden of affirmatively showing malice, as he is required to, he shifted the burden to the defendant and effectively made him disprove malice. The First Amendment forbids that tactic.

B. The statements said to be libelous were in fact proven true.[19/]

1. Fascist fellow traveler.

Though the trial court made much of the fact that Buckley loudly broke with the John Birch Society in 1965, a fact known to appellant, it does not follow from this that Buckley is not a fascist fellow traveler. Buckley was supporting the Society until his break; he was thus traveling with them for a number of years. Moreover, appellant did not consider the break wholly complete; he believed Buckley condemned only the means employed by the Society, not its ultimate goals and that he continued to cooperate with individual members. See p. 16, supra. There was no finding that appellant's professed interpretation of the break, even if

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19/ Even though appellant denies calling Buckley a fascist fellow traveler, he is right in being entitled to show it is true nonetheless. According to Tentative Draft No. 21, Restatement Second of Torts (April 5, 1975) comment h, at 40, " . . .if the defamatory matter is true, it is immater that the person who publishes it believes it to be false; it is enough that it turns out to be true."

wrong or irrational, was insincere.

For similar reasons, Buckley's sharp disputes with the American Mercury, Kent Courtney and Robert Welch, to which the court below ascribed importance (394 F. Supp. at 935; AII 551), do not establish that Buckley was not a fascist fellow traveler. Appellant was not reckless in concluding that such associations with those he believed fascist, even if ended, were, when combined with all of Buckley's later expressed right-wing sympathies, probative of his position. See pp. 13-21, supra. And it was telling, of course, that the same groups that appellant thought fascist thought of Buckley as an ally. P. 17, supra.

Appellant interpreted many of Buckley's writings as demonstrating a fascist or right-wing ideological slant, thus making him a fellow traveler. See p. 16, supra. The judge found that the writings "positively rebut" such a conclusion (394 F. Supp. at 936, AII. 552). But what happens to "uninhibited, robust and wide-open" debate if, under penalty of libel, a person must read a political column the same way as a judge or jury later interprets it. At the very heart of the First Amendment is the idea that such diverse opinions as to what a writing shows about the beliefs of its author must be protected from judicial inquiry. As the Court put it in Monitor Patriot Co. v. Roy, supra at 275, "A community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it."

Moreover, Buckley's actions are similarly subject to conflicting interpretations. Appellant believes any legitimization of fascist goals makes one a fellow traveler. See p. 14, supra. Some of Buckley's actions, such as speaking on platforms with Birchers, joining rightist political committees, and publishing articles by fascists even if they deal with innocuous subjects, see p. 16 supra, have this tendency. If the tendency is there, it cannot be reckless to point where it leads. It is one of the most common forms of political argument to say that the words or actions of one's opponents, while they may be nominally directed against a hated cause, actually have the effect of helping that cause's enemies. Thus, demonstrators favoring an end to the war in Vietnam were accused by the war's supporters of actually prolonging the conflict, a result neither side wanted. Similarly, Secretary of State Kissinger undoubtedly believes his Middle East diplomacy is promoting the security of Israel. But ardent Zionists could conclude that Kissinger is the worst enemy Israel has because he is forcing her to compromise her security. If such persons were sufficiently aroused, they might even call Kissinger anti-semitic on the same basis. The rationale of the district court decision here would permit Kissinger to recover if a judge or jury decided it was clear his activities "really" make him Israel's friend. See Adey v. United Action for Animals, 361 F. Supp. 457, 465 (S.D.N.Y. 1973), aff'd 493 F. 2d 1397 (1974).

The only evidence on which the district court relied which

is even arguably probative on the issue of actual malice is the series of letters appellant sent Buckley in 1967-68 in which he said he did not consider Buckley a fascist or radical rightist. See p. 13, supra. The court found that these letters showed appellant clearly did not believe what he wrote in the book (394 F. Supp. at 937-38; AII. 553-54). Appellant's plausible explanation was that he was merely being courteous in making an approach to Buckley to find out what his relationship to the right wing was. If the two men were--as Littell had been assured by mutual friends--in basic agreement on political issues (AII. 306-07, 317-23), it would surely make no sense to write calling Buckley a fascist fellow traveler, for no understanding could come of that. But this court need not even resolve the factual conflict, for the last letter was written in February 1968, more than a year before Wild Tongues was completed. The correspondence is thus simply not probative of what appellant thought about Buckley when he wrote the book. It is possible, indeed likely, that appellant's opinion of Buckley changed from 1967 to 1969 as a result of the personal contacts appellant had with Buckley. Appellant testified that he had doubts about Buckley's political position but did not want to accuse him unfairly of fellow traveling (AII. 315-25); that was the reason for writing the personal letters in the first place. It is hardly surprising that these doubts crystallized into the harsh accusations of Wild Tongues as a result of Buckley's personal attacks on appellant. Nor is it unreasonable after appel-

lant saw Buckley twist his own words, call him names, and accuse the IAD of betraying its principles (AII. 326-27).

In Time, Inc. v. Pape, supra, the Court held that the "deliberate choice" of "one of a number of possible rational interpretations of a document that bristled with ambiguities," even though the choice "~~agreeably~~ arguably reflected a misconception," was insufficient evidence of constitutional malice to create a jury issue. 401 U.S. at 290. Buckley's writings and actions "bristle with ambiguities" to a far greater extent than the Civil Rights Commission report at issue in Pape. The questions Buckley's writings and actions raise about his political orientation are far more difficult, complex and significant than the simple issue in Pape whether the Commission report said one thing or something else. Appellant must be protected in his good faith interpretations of them even if the trial judge thinks he was incorrect.

2. The Purveying and Lying Charges.

That these two statements were in fact true may be shown summarily.

The court below itself found that there were two instances where Buckley did pick up materials from openly fascist journals. 394 F. Supp. at 738; AII. 554. Appellant testified as to other similar instances without contradiction. See pp. 19-20, supra. Even if some of appellant's attributions were incorrect, the court below never questioned the innocence of these errors and

appellant's resulting belief (see AII 45-46, 57, 327, 370-72). Finally, Buckley himself admitted there are times when he would take up a cause initiated by the far right wing. See p. 18, supra.

On the assertion that Buckley lied about others, the material at pp. 23-27, supra, supports that charge too without contradiction. Appellant believed that Buckley could have been sued by any number of people, as he was by several. The mere fact that suits do not succeed for one reason or another does not mean that Buckley is not a libeler in the loose but constitutionally protected useage of the word. See e.g., Buckley v Vidal, 327 F. Supp. 1051, 1052-1054. Since appellant honestly believed Buckley had made libelous accusations, it was perfectly reasonable to compare him to the libeler Pegler. Moreover, the court below did not disbelieve appellant's testimony that he considered Buckley's frequent gross misrepresentations of and attacks upon Martin Luther King, Jr. the equivalent of lies. Instead, the court changed the focus of the statement to "factual" lies, which appellant considered rare, although his own experiences with Buckley included them.

VI

The Punitive Damages Awarded to Buckley Are Forbidden by the First Amendment and, in Any Case, Are Excessive

In Gertz v. Welch, supra at 350, the Supreme Court held that punitive damages cannot constitutionally be awarded to a plaintiff who has met a standard of proof less demanding than "actual malice." This was the first holding of the Court that punitive damages are subject to First Amendment restraints. The Court did not have to rule on the question whether punitive damages are permitted when the New York Times standard of proof is met. See 418 U.S. at 349. Though punitive damages were upheld under the slightly less demanding standard of proof enunciated by Mr. Justice Harlan for the plurality in Curtis Publishing Co. v. Butts, supra at 161, Gertz signals a departure from the Butts implication that punitive and compensatory damages are subject to the same constitutional standard (388 U.S. at 160). For the same reason, this court's rejection in reliance on Butts of a constitutional attack on punitive damages in Goldwater v. Ginzburg, supra at 340-41, should not be considered controlling. In the instant case, like Goldwater, and Reynolds v. Pegler, 223 F. 2d 429, 434 (2nd Cir.), cert. denied 350 U.S. 816 (1955),

the only real damages were punitive, and the award was an infinitely large multiple of the actual harm done. Indeed, as the testimony of Allard Lowenstein, supra, p. 7, makes clear, Buckley's reputation, far from suffering by virtue of Wild Tongues, climbed to great heights after the book was published, so there is no relationship whatever between the actual effect of the writing and the award.

The Court in Gertz was also concerned lest the discretion to award punitive damages be used "selectively to punish unpopular views." Certainly that is an issue very much present in the case at bar.

The discussion of punitive damages in Gertz demonstrates why Buckley should not be permitted to recover them. The Court was concerned with the "wholly unpredictable amounts" that can be awarded subject only to "the gentle rule that they not be excessive." Punitive damages may thus bear no relationship whatever to the actual harm caused. In Butts, which rejected that very objection, 388 U.S. at 160, this was seen as something of a virtue--it would allow the sting of a libel judgment to be brought home to a defendant whose good fortune it otherwise was that "circumstances outside the publication" made "a compensatory imposition an inordinately light burden." Id. at 161. But Gertz simply rejects that justification.

Perhaps the most important reason that Gertz barred punitive damages under less than New York Times standards of proof is that their award "unnecessarily exacerbates the danger of media self-censorship" (418 U.S. at 350). It does so, according to the Court, without serving the legitimate competing interest in compensating private persons for actual damage to reputation, Id. at 348, since punitive damages "are not compensation for injury," Id. at 350. This is a rejection of the assertion in Butts that "punitive damages serve a wholly legitimate purpose in the protection of individual reputation" (388 U.S. at 161).

If punitive damages cannot properly be awarded to further the goal of protection of private reputations, neither can their award be justified to increase the protection afforded the reputations of public figures or officials who have suffered no actual damages. Clearly the "irrelevancy" of the punitive award to the state interest in compensating actual harm suffered is no less in the case of public persons than private individuals. Moreover, Gertz recognizes that the state interest in compensating public persons is far weaker than the interest in compensating private individuals because the former have greater access to means of rebuttal and have voluntarily assumed the risk of damage to reputation (418 U.S. at 344-45).

Finally, the concerns expressed by the Court are not vitiated by the fact that public figures and officials carry a New York Times burden. Punitive awards can still be in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused" (418 U.S. at 350), [20/] and disagreeable views may still be punished.

It might be argued that when the plaintiff's proof meets the New York Times test, the state interest to be balanced against the danger of a timid and self-censored press somehow shifts from the compensation of actual harm to the punishment of reprehensible conduct and the deterrence of its future occurrence. See Id. If this is so, the punitive damages sound supiciously--if not identically--like criminal penalties. Gertz recognizes this, labeling them "private fines." But they are imposed without even the most basic safeguards of a criminal proceeding. If the state is to serve an interest so completely punitive, when the victim has been fully compensated for actual harm and has voluntarily put himself in a position to be hurt by public debate about public issues, it should afford the

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20/ Where a public figure or official does show actual damages, the theory advanced here would not necessarily bar recovery of a punitive award in a reasonably related amount.

defendant the procedural protections of a criminal action.[21] Cf. Garrison v. Louisiana, supra.

Whatever procedures are followed in making punitive damage awards, the amounts of these civil fines should not disproportionately exceed usual and reasonable criminal fines. In only the smallest handful of cases, generally involving the most despicable crimes, would fines approach the $400,000 punitive damage award in Butts, the $500,000 in Sprouse, supra, $25,000 against Ralph Ginzburg, or even the $7,500 levied against appellant. If judges are now concerned that criminal sentences they impose are too erratic, the problem is much greater where civil juries with no experience in comparable cases levy private fines. And in criminal sentencing, statutory maximum and minimums sharply limit judicial discretion to a much greater degree than the "excessiveness" doctrine on jury verdicts.

21/ Particularly relevant in this case is the fifth amendment prohibition of compelled self-incrimination, since virtually all of the proof of actual malice came from defendant's testimony.

In short, under modern interpretations of the first Amendment, stressing the essential "need for a vigorous and uninhibited press," 418 U.S. at 342, Buckley, a public figure voluntarily involved in debate over the most far-reaching issues and controlling a massive arsenal of media weapons, should not be permitted to recover punitive damages against the author of a book which caused absolutely no actual compensable harm. The possibility that such an award might be upheld putting a publisher out of business (see Sprouse v. Clay Communication, Inc., supra at 691-92) or putting an author in debt for the rest of his life, too greatly threatens to silence the "vehement, caustic, and . . . unpleasantly sharp attacks" protected by the First Amendment.[22/]

Finally, even if the punitive damages award here is not unconstitutional, it should be reversed because it is excessive. The trial judge awarded damages based on a finding that Littell published "with reckless disregard of the effects upon Buckley" (394 F. Supp. at 945; AII.

22/ Even without punitive damages, the state interest in clearing plaintiff's allegedly besmirched reputation is adequately served by a compensatory award for actual, proven damages, as Gertz recognizes. If that award is necessarily nominal, the interest is still protected since plaintiff's reputation has been officially cleared.

561). But any effects of the publication on Buckley were surely too minimal to warrant a $7,500 recovery. At most he was angered by it. Any claimed fear it would damage his career (e.g., AI. 115, 118-19) is obviously imaginary in view of the testimony that his celebration is far greater today than it was at the time of publication of the supposed libel.

The award was also insupportable in view of the judge's failure to rely on any evidence of Littell's financial situation to determine whether the punitive damages would be an effective deterrent, an undeserved and excessive burden, or a mere slap on the wrist. The fact is that, on the basis of the only evidence in the record, the award is confiscatory. Littell could not afford a lawyer to defend him at trial; the award is fifteen times Littell's gross income from the book and amounts to almost one dollar for each copy sold; and with interest and costs, Littell will have to pay in damages nearly the amount of Macmillan's gross revenue from the book (See p. 4, supra).

Therefore, if the judgment below is otherwise affirmed, the award of punitive damages should be set aside entirely or, at the very least, substantially reduced.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed and Buckley's complaint ordered dismissed.

Respectfully submitted,

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Certificate of Service

I, Melvin L. Wulf, a member of the bar of this Court, hereby certify that the foregoing brief for appellant was served upon appellee by mailing three copies, first-class postage prepaid, to his attorney, J. Daniel Mahoney, 51 West 51st Street, New York, N. Y. 10019.

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